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NO. (3)

Supreme Court, U.S.
FILED
OCT 30 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOSEPH LEE ROWLAND — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

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RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinions of the Kentucky Supreme Court and the Kentucky Court of Appeals are correctly set forth in slip form in petitioner's Appendix and Supplemental Appendix.

JURISDICTION

Petitioner has properly claimed jurisdiction pursuant to 28 U.S.C. §1257(a). However, respondent contests petitioner's assertions that this Court has jurisdiction pursuant to United States Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has properly listed the constitutional provisions involved in this matter.

COUNTERSTATEMENT OF THE CASE

Petitioner entered a conditional guilty plea in Grant Circuit Court to two counts of second degree assault. He was sentenced to a total of 20 years imprisonment. Pursuant to the conditional guilty plea, petitioner appealed to the Kentucky Court of Appeals. The Kentucky Court of Appeals affirmed petitioner's convictions. Petitioner thereafter requested the Kentucky Supreme Court to grant discretionary review of the decision of the Court of Appeals. The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals decision upholding petitioner's convictions.

Petitioner has now filed a petition for a writ of certiorari to the Kentucky Supreme Court.

COUNTERSTATEMENT OF THE FACTS

Carol and Daniel Rowland were married in 1987. Daniel had two children from a previous marriage: petitioner, 15 years old in 1991 and Mark, 12 years old. Carol had four children from a previous marriage: Eddie Schardine, 16; Kathy Schardine, 13; Billy Schardine 6; and Denny Schardine, 5. In January, 1991, Carol, Daniel and the six children were all living together.

On January 29, 1992, Carol and Daniel woke up at 5:30 a.m. Around 5:40 a.m., Daniel left for work. He kissed Carol good-bye and told her he loved her. Carol then started getting the children ready for school. She woke Kathy first. A few minutes later she woke Mark and Joe and then Billy and Denny. She let Eddie sleep because he was not going to school that day.

Each morning Carol would drive the children to the school bus stop. Petitioner's morning chore was to warm-up the car and scrape the frost from the windows. On January 29, 1992, it was very cold

with a heavy frost. Carol looked out the window about five minutes before time to leave for the bus stop and noticed the car was running. She thought it unusual petitioner did not have to be reminded as usual to go start the car. She did not see petitioner around the car.

Mark, Kathy, Billy and Denny went outside to get in the car. Carol walked back in the house to look for petitioner. She saw Eddie still sleeping. She did not find petitioner. She walked back outside and asked the other children if they had seen him. They responded in the negative.

As Carol was standing on the porch she heard the sound of a gunshot. She immediately felt as though "somebody hit me in the back with a two by four or something". The other children came running. She yelled for Mark to get the children down to the ground. A second shot hit Carol in the back.

Carol turned toward where she had heard the gunshot sound. She saw petitioner standing at the edge of the house with a .38 pistol in his hand.

Carol could feel blood running out of her chest. She was having difficulty breathing. The first bullet had entered her back and exited her chest. The second bullet lodged in her back. Carol laid down on the ground.

Kathy ran to her mother. Petitioner fired a third shot which struck Kathy in the back. Kathy stumbled and crawled back to the house. The other kids also ran into the house. They were screaming and crying. Carol yelled at them to call the state police. Carol lost a lot of blood and became disoriented. She remembered being in an ambulance and taken to a hospital.

As a result of her wounds, Carol suffered permanent paralysis in her right side. As a result of the shooting, Carol became depressed. She "was freaking out about getting shot and my daughter getting shot". In April, 1991, her treating

physician referred her to Dr. Snider, a psychiatrist. Dr. Snider diagnosed Carol as having post-traumatic stress disorder[1] and secondary depression. Dr. Snider prescribed medication for Carol's depression and anxiety. He also referred Carol to Dr. William Wester, a psychologist.

Dr. Wester interviewed Carol on September 30, 1991. Carol told Dr. Wester that after she was shot the second time she turned around and "saw [petitioner] turning and the light hit his eyes". She saw him "roll back around the front of that house with the gun in his hand". She said that in the hospital she told her husband, "I think Joe shot me". She also related that two of the other children witnessed petitioner shoot her and Kathy.

Dr. Wester agreed with Dr. Snider's diagnosis of Carol as secondary depression and post-traumatic

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1 Post-traumatic stress disorder is a type of anxiety due to an overwhelming psychological or physical trauma. It is characterized by re-experiencing the traumatic event and avoiding situations which remind the person of the event. One of the symptoms of post-traumatic stress disorder is the inability to recall certain aspects surrounding the traumatic event.

stress disorder. Dr. Wester decided to place Carol under hypnosis to enhance her memory. On October 16, 1991, Dr. Wester placed Carol under hypnosis. Dr. Wester had Carol describe the events leading up to the shooting and what she remembered about the shooting. "Very little difference" existed in Carol's pre-hypnotic description and what she described under hypnosis. Dr. Wester described Carol's hypnotic description as, "basically, just more fine-tuned". Dr. Wester felt the hypnosis was helpful in "enhancing" some of Carol's "fine memories".

Petitioner was indicted on two counts of first-degree assault arising from his shooting Carol and Kathy Rowland.

Petitioner moved to suppress Carol's testimony on the basis it had been hypnotically refreshed. The trial court held a hearing on petitioner's motion. Dr. Wester and an expert on hypnosis appointed to assist petitioner testified at the hearing.

The trial court overruled petitioner's suppression motion. The trial court stated Carol could testify and the jury then determine the credibility and believability of her testimony as it would do with any other witness. However, the court ruled the Commonwealth would be precluded from introducing the fact Carol was placed under hypnosis, but stated petitioner could choose to cross-examine Carol on this point. If petitioner did choose to cross-examine Carol about the hypnosis, the trial court stated it would then allow the Commonwealth to introduce additional testimony to explain hypnosis.

Carol testified at trial. After Carol's direct examination, petitioner notified the court he wished to withdraw his not guilty plea and enter a conditional guilty plea. The trial court accepted petitioner's guilty plea. Pursuant to the plea agreement, the two first-degree assault charges were amended to second-degree assault. He was

sentenced to ten years imprisonment on each count, said sentences to run concurrent.

Pursuant to the conditional guilty plea, petitioner appealed to the Kentucky Court of Appeals. The Kentucky Court of Appeals affirmed petitioner's convictions. Petitioner thereafter requested the Kentucky Supreme Court to grant discretionary review of the decision of the Court of Appeals. The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals decision upholding petitioner's convictions.

Petitioner has now filed a petition for a writ of certiorari to the Kentucky Supreme Court.

REASONS FOR DENYING THE WRIT

THE KENTUCKY SUPREME COURT'S DECISION FOLLOWS THE MAJORITY VIEWPOINT THAT A WITNESS SHOULD NOT BE DISQUALIFIED FROM TESTIFYING ON THE GROUND SHE WAS HYPNOTIZED BEFORE TRIAL AND HER PRE-TRIAL AND POST-TRIAL HYPNOTIC STATEMENTS WERE THE SAME.

In his petition for certiorari, petitioner portrays that Carol Rowland's identification of him

as her assailant came only after she was hypnotized. Petitioner ignores the true state of the evidence. In actuality, Carol adamantly identified petitioner as her assailant before she was hypnotized. In her pre-hypnosis statement, Carol stated that after she was shot the second time, she turned around and "saw [petitioner] turning and the light his eyes." She saw petitioner "roll back around the front of the house with the gun in his hand." (Statement of Carol Rowland, pp. 6, 13.) She said that while in the hospital she told her husband, "I think Joe shot me." (Statement of Carol Rowland, p. 9.) She also related that two of her other children saw petitioner shoot her and her daughter. (Statement of Carol Rowland, pp. 10-11.) Contrary to petitioner's representations, this is not a case where hypnosis enabled a witness to remember previously unknown facts. The only additional facts Carol recalled during hypnosis were comments concerning seeing petitioner's hair and jacket.

Petitioner bases his request for certiorari on his claim that the Kentucky Supreme Court's decision is in conflict with the majority of other jurisdictions. This is wholly inaccurate. The overwhelming majority of states and federal circuits have rejected a per se rule of inadmissibility. By and large the courts require the trial court to make a preliminary assessment of admissibility, considering several factors including adherence to procedural guidelines to determine whether the proposed testimony is reliable and its probative value outweighs its prejudicial effect. If the evidence is then admissible, it is treated as any other competent evidence, with its weight and credibility to be adjudged by the jury. Further, many of the jurisdictions which originally excluded testimony generated by hypnotically expanded memory have modified their extreme positions in that a witness may nevertheless testify with regard to those matters which he or she was able to recall and

relate prior to hypnosis. As noted by the Virginia appellate courts in Hall v. Commonwealth, 12 Va. App. 198, 403 S.E.2d 362 (1991):

> We believe that the appropriate way to resolve these competing interests is to adopt the majority rule and permit a witness who has undergone hypnosis to testify as to those events recalled prior to undergoing hypnosis so long as this pre-hypnotic recall has been adequately documented.

See also: Chamblee v. State, 527 So.2d 173 (Ala.Cr.App. 1988); People v. Romero, 745 P.2d 1003 (Colo. 1987), cert. denied Romero v. Colorado, 485 U.S. 990, 99 L.Ed.2d 506, 108 S.Ct. 1296 (1988); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); State v. Jorgenson, 8 Or.App. 1, 492 P.2d 312 (1971); Pearson v. State, Ind. 441 N.E.2d 468 (1982); House v. State, 445 So.2d 815 (Miss. 1984); State v. Varela, 112 N.M. 538, 817 P.2d 731 (1991); State v. Johnston, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988); State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386 (1983); Commonwealth v. Kater, 409 Mass. 433, 567 N.E.2d 885 (1991); Prime v.

State, 767 P.2d 149 (Wyo. 1989); State v. Glebock, 616 S.W.2d 897 (Tenn.Cr.App., 1981); State v. Brown, 337 N.W.2d 138 (N.D. 1983); Zani v. State, 758 S.W.2d 233 (Tex.Cr.App. 1988); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Iwakiri, 682 P.2d 571 (Idaho 1984); People v. Smrekar, 68 Ill.App.3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); State v. Greer, 609 S.W.2d 423 (Mo.Ct.App. 1980), vacated on other grounds Missouri v. Brown, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); Brown v. State, 426 So.2d 76 (Fla.Dist.Ct.App. 1st Dist. 1983); State v. Martin, 33 Wash.App. 486, 656 P.2d 526 (1982); Hall v. Commonwealth, 12 Va.App. 198, 403 S.E.2d 362 (1991); State ex rel. Neely v. Sherrill, 165 Ariz. 508, 799 P.2d 849 (1990); People v. Lee, 434 Mich. 59, 450 N.W.2d 883, cert. denied, 498 U.S. 879, 111 S.Ct. 211, 112 L.Ed.2d 171 (1990); Elliotte v. State, 515 A.2d 677 (Del. 1986); State v. Moreno, 68 Haw. 233, 709 P.2d 103 (1985); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); State v.

Koehler, 312 N.W.2d 108 (Minn. 1981); State v. Patterson, 213 Neb. 686, 331 N.W.2d 500 (1983); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983); United States v. Awkward, 597 F.2d 667 (9th Cir. 1979) cert. denied, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985); cert. denied, 475 U.S. 1046, 106 S.Ct. 1263, 89 L.Ed.2d 572 (1986); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986) cert. denied 478 U.S. 1010, 106 S.Ct 3310, 92 L.Ed.2d 723; McQueen v. Garrison, 814 F.2d 951 (4th Cir. 1987), cert. denied 484 U.S. 944, 108 S.Ct. 332, 98 L.Ed.2d 359.

This Court's decision in Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) supports the Kentucky courts' decision to admit Carol Rowland's testimony. In Rock v. Arkansas, this Court was faced with an Arkansas statute prohibiting any defendant from testifying who had

previously been under hypnosis. This Court held the statute violated a defendant's constitutional right to testify in his own behalf. This Court did decline to specifically address the issue of admissibility of testimony of previously hypnotized witnesses other than criminal defendants. Fn. 15, 438 U.S. at 58, 107 S.Ct. At 2712, 97 L.Ed.2d at 50. However, after reviewing the literature and the caselaw of the various jurisdictions pertaining to hypnosis, this Court concluded:

> Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnotic recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

483 U.S. at 61, 107 S.Ct. at 2714, 97 L.Ed.2d at 52.

Thus, this Court found the utilization of safeguards, corroboration and traditional means of testing believability to be sufficient tests of reliability to admit hypnotically refreshed testimony. The Kentucky courts followed this route in ruling the challenged testimony in the instant case would be admissible. Before admitting the challenged testimony, the trial court found:

1. Dr. Wester is an experienced and trained psychologist and in fact is board certified in clinical hypnosis.

2. Dr. Wester is independent of the Commonwealth of Kentucky in that he is not regularly employed by the Commonwealth, the Kentucky State Police, or any entity thereof.

3. An accurate summary exists of the information Dr. Wester received before the videotape of the hypnosis began.

4. Dr. Wester obtained a description of the events from Carol Rowland before the hypnosis session began.

5. The sessions between Dr. Wester and Carol were either audio or video recorded.

6. Only Dr. Wester and Carol were present during the sessions.

7. The hypnotic session was not overly suggestive and was devoid of any leading questions.

8. The probative value of Carol's testimony outweighs the prejudicial effect of the fact she went through a hypnotic session, especially in light of the safeguards the trial court was going to impose.

9. Other corroborating evidence supports Carol Rowland's testimony.

10. The trial court balanced the relevancy, reliability and helpfulness of the testimony against the likelihood of any waste of time, confusion and prejudice.

11. The procedure of examination and cross-examination of Carol Rowland, even though her memory was enhanced by hypnosis will put the jury in the same position as any other witness who would testify.

As noted in both the Kentucky Court of Appeals and Kentucky Supreme Court decisions, the trial court's extensive findings of fact corresponded to safeguards utilized in other jurisdictions. See

e.g.: Elliotte v. State of Delaware, 515 A.2d 677 (Del. 1986) and People v. Tunstall, 63 N.Y.2d 1, 479 N.Y.S.2d 192, 468 N.E.2d 30 (N.Y.Ct.App 1984). See also: State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

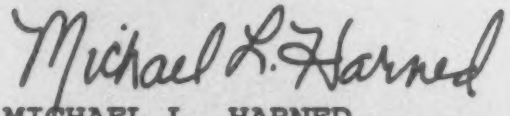
Appellant, therefore, is simply incorrect in arguing the Kentucky Supreme Court's decision is out of step with other jurisdictions which have addressed this issue. As such, no compelling reasons exists for this Court to grant his petition for writ of certiorari.

CONCLUSION

For the above-stated reasons, the respondent respectfully submits that the Petition for Writ of Certiorari to the Kentucky Supreme Court should be denied.

Respectfully submitted,

CHRIS GORMAN
ATTORNEY GENERAL



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